Plumbers & Pipefitters Local 525 of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry *and* P & P Plumbing c/o APC and International Union of Operating Engineers, Local 501, AFL-CIO. Case 31-CD-246

March 22, 1983

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by P & P Plumbing c/o APC, herein called the Employer, alleging that Plumbers & Pipefitters Local 525 of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, herein called Respondent, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Union of Operating Engineers, Local 501, AFL-CIO, herein called Local 501.

Pursuant to notice, a hearing was held before Hearing Officer Kevin Donnellan on June 29 and 30 and July 1 and 9, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and Local 501 filed briefs, and Respondent and Karat, Inc. d/b/a Stardust Hotel submitted statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer is a partnership licensed to do business in the State of Nevada, where it operates as a plumbing contractor. During the past year, the Employer purchased directly from outside the State of Nevada goods valued in excess of $50,000 per year. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Plumbers & Pipefitters Local 525 of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry and International Union of Operating Engineers, Local 501, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *The Work in Dispute*

The work in dispute involves the installation of new water lines to approximately 1,000 guestrooms in the Stardust Hotel located at Las Vegas Boulevard South, Las Vegas, Nevada.[1]

B. *Background and Facts of the Dispute*

On a semicontinuous basis since 1977, the Employer has performed various plumbing services at the Stardust Hotel under contracts with the hotel. These contracts are in the form of "work orders" issued by the hotel authorizing the Employer to perform specific work. Upon receipt of a work order, the Employer obtains the necessary permits and commences the work utilizing employees represented by Respondent. For its services, the Employer bills the hotel weekly on the basis of the cost of materials and labor plus approximately 27 percent for overhead and profit.

In December 1977, Local 501 filed a grievance against the hotel arguing that the hotel's decision to contract certain bathtub replacement work to the Employer violated the hotel's collective-bargaining agreement with Local 501.[2] This grievance was pursued to arbitration and on June 2, 1978, arbitrator Julius N. Draznin issued an opinion and award finding that the bathtub replacement work was "work generally and customarily performed by [hotel employees represented by Local 501]" and, therefore, that the hotel violated article 12.03 of its agreement with Local 501 by contracting such work to the Employer without first seeking from Local 501 personnel qualified to perform that

[1] The notice of hearing issued in this matter describes the work in dispute as also including "the removal of existing galvanized water lines"; however, at the hearing the Employer and Respondent stipulated that the dispute was limited to the installation of new water lines, which includes the installation of plumbing fixtures. Although Local 501 declined to join in this stipulation, the record satisfies us that the stipulation accurately reflects the work in dispute.

[2] Local 501 has represented a unit of the hotel's operations and maintenance engineers since approximately 1956 or 1957.

work.[3] Thereafter, notwithstanding the outcome of the Draznin arbitration, the Employer completed the bathtub replacement work and the hotel continued to contract plumbing work to the Employer. In an effort to comply with the arbitrator's award, however, the hotel requested a licensed master plumber from Local 501, which the hotel needed in order to obtain the necessary plumbing permits without using a plumbing contractor.[4] Ultimately, in March 1981, Local 501 referred John Rosini, who is currently employed by the hotel as a licensed master plumber.

In late 1981, the hotel decided to contract out the work in dispute after John Rosini indicated his belief that he could not get a sufficient number of qualified personnel from Local 501 to do the job. Thereafter, the hotel contracted the work in dispute to the Employer, who commenced the work utilizing employees represented by Respondent. This work is part of a project in which the hotel is remodeling approximately 1,000 of its guestrooms.[5]

In early 1982, Local 501 contacted the hotel and protested the fact that the Employer was performing the work in dispute; in response, the hotel invited Local 501 to refer plumbers from its hiring hall. Of the 12 individuals referred pursuant to the hotel's request, only 2 were licensed journeyman plumbers; in the hotel's view an insufficient number to do the job. Thereafter, in response to Local 501's continuing protest, the hotel agreed to submit the dispute to arbitrator Draznin and an arbitration was scheduled for May 6 and 7, 1982.[6]

Upon learning of the upcoming arbitration of Local 501's claim to the work in dispute, both the Employer and Respondent requested permission to participate therein; by letter dated April 15, arbitrator Draznin denied their requests. On April 19, the Employer informed Respondent that in the event that Local 501 prevailed at the upcoming arbitration, it would assign the work in dispute to members of Local 501. By letter dated April 20, Respondent informed the Employer that it would picket both the Employer and the hotel if the Employer attempted to utilize members of Local 501 to perform the work in dispute. On April 23, the Employer filed a charge alleging that Respondent violated Section 8(b)(4)(D) of the Act. Thereafter, the arbitration scheduled for May 6 and 7 was postponed indefinitely pending the outcome of this proceeding.

C. *The Contentions of the Parties*

The Employer and Respondent contend that this matter is properly before the Board and that the work in dispute should be awarded to employees represented by Respondent on the basis of the Employer's preference, the Employer's collective-bargaining agreement with Respondent, the Employer's past practice, industry practice, relative skills, local building ordinances, and economy and efficiency of operations.

Local 501 initially contends that this matter is moot in light of the hotel's intention, expressed at the hearing in this matter, not to contract plumbing work to the Employer in the future. Assuming that this matter is not moot, it is the position of Local 501 that the work in dispute should be assigned to employees it represents on the basis of its collective-bargaining agreement with the hotel, the hotel's preference, the hotel's past practice, area practice, relative skills, and economy and efficiency of operations; Local 501 further contends that the local building ordinances are irrelevant to our determination of this matter.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

At the hearing in this matter, and in its brief to the Board, Local 501 moved to dismiss these proceedings, claiming that this matter is moot in light of the hotel's intention not to contract plumbing work to the Employer in the future. Although Local 501 correctly characterizes the hotel's expressed intentions regarding future plumbing work, our review of the record reveals that the Employer

[3] Art. 12.03 of the hotel's 1976–80 collective-bargaining agreement with Local 501 provided, *inter alia*, that

> [t]he [hotel] retains the right to contract out work covered under this Agreement to the extent and for the purposes it has done so in the past. Other work of the type customarily performed by employees in the bargaining unit covered by this Agreement may be contracted out only if [Local 501] cannot furnish the Employer qualified employees to perform the work. . . .

This article was incorporated without change into the hotel's 1980–83 agreement with Local 501.

[4] Under the building ordinances applicable to the hotel, the hotel qualifies as a general contractor with an "E" license. A general contractor with an E license must employ a licensed master plumber in order to obtain plumbing permits.

[5] The Employer's participation in this remodeling project is limited to the work in dispute. Prior to the arrival of the Employer's employees at a particular room, other employees remove the plumbing fixtures, walls, and old water lines. After the installation of the new water lines, other employees replace the walls, install tile in the shower and tub areas, and paint and wallpaper the room. The Employer's employees then return to the room and install the plumbing fixtures. The Employer's employees work on eight rooms at a time, spending a total of 10–20 hours in each room. Because the number of rooms available for remodeling varies with the occupancy of the hotel, the Employer may complete as many as 40 or as few as 8 rooms per week; thus, the number of the Employer's employees working in the hotel fluctuates considerably.

[6] Unless otherwise specifically indicated, all dates used hereinafter shall refer to the calendar year 1982.

nevertheless would complete the work in dispute pursuant to its contract with the hotel. In this regard, we note that Local 501 has not disclaimed interest in the work in dispute notwithstanding the hotel's intentions regarding future plumbing work. Accordingly, we find that this matter is not moot and we deny Local 501's motion to dismiss.

It is clear from the evidence summarized above that Respondent claims the work in dispute and threatened to picket the Employer and the Stardust Hotel with an object of forcing the Employer to continue to assign the work in dispute to employees it represents. In addition, the parties have stipulated that there is no agreed-upon method for the voluntary adjustment of the dispute.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[7] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[8]

As a threshold issue, we note that the parties disagree as to whether the Board should give weight to the preference and past practice of the Employer or to that of the hotel. It is well settled that, in resolving jurisdictional disputes involving more than one employer, the Board gives weight to the preference and past practice of the employer who controls the assignment of the work in dispute.[9] In the instant matter, the Employer is performing the work in dispute under contract with the hotel.[10] Although the complete terms of this contract are not in evidence, it is apparent from the record that, under this contract, the Employer controls the assignment of the work in dispute. This conclusion is supported by the consistent practice of the Employer and the hotel under previous contracts, described above, as well as the complete absence of evidence that the hotel retained such rights in the current contract. Moreover, it was the Employer, not the hotel, which informed Respondent that it might reassign the work in dispute to Local 501. Accordingly, we conclude that under the circumstances of this case it is the preference and past practice of the Employer, rather than that of the hotel, which should be considered as a factor in determining the dispute.

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Employer is signatory to the current multiemployer collective-bargaining agreement between Respondent and the Associated Plumbing & Air Conditioning Contractors of Nevada, Inc. (APC), a multiemployer bargaining association. Appendix A to that agreement provides that the work covered thereby includes the installation of "1. All piping for plumbing . . . 3. All cold, hot, and circulating water lines . . . [and] plumbing fixtures and appliances . . . ." The Employer does not have a collective-bargaining agreement with Local 501.[11] Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Respondent.

2. Employer assignment, preference, and past practice

Since the Employer began performing plumbing work for the hotel in 1977, its consistent practice has been to assign all such work to employees represented by Respondent. In the instant matter, the Employer has assigned the work in dispute to employees represented by Respondent and has indicated that it prefers such an assignment. Accordingly, we find that these factors favor an award of the work in dispute to employees represented by Respondent.

3. Area practice

At the hearing in this matter, both Local 501 and Respondent introduced extensive testimony regarding the spectrum of plumbing work employees rep-

[7] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961).

[8] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[9] See, e.g., *International Union of Operating Engineers, Local No. 139 (McWad, Inc.)*, 262 NLRB 1300 (1982).

[10] At the hearing in this matter, Local 501 introduced testimony indicating that it had filed an unfair labor practice charge with Region 31 alleging that the hotel violated Sec. 8(a)(5) of the Act by contracting the work in dispute to the Employer. Although there is no direct evidence in the record as to the disposition of this charge, counsel for Local 501 indicated that the Regional Office has deferred action thereon pending the outcome of the arbitration between Local 501 and the hotel. Since this issue is not properly before us at this time, we do not pass on the propriety of the hotel's contracting of the work in dispute to the Employer.

[11] Local 501 does have a collective-bargaining agreement with the Stardust Hotel; however, since the hotel does not control the assignment of the work in dispute, this collective-bargaining agreement is not a factor to be considered in resolving this matter.

resented by each have performed at the various hotels in the Las Vegas area. In this regard, it appears that employees represented by each Union have performed both major and minor plumbing work, with no clear pattern to indicate a basis to distinguish between the various work assignment practices. Indeed, article 24 of Local 501's collective-bargaining agreement with the Stardust Hotel specifically acknowledges that work assignment practices vary from one hotel to another.[12] Thus, there is no clear area practice. Accordingly, we find that this factor does not favor an award of the work in dispute to employees represented by either union.

4. Relative skills and economy and efficiency of operations

Both Local 501 and Respondent argue that employees they represent possess the skills necessary to perform the work in dispute. In this regard, the record shows that the work in dispute requires the skills and knowledge of a journeyman plumber. The record further shows that, because the number of employees needed by the Employer fluctuates considerably, the Employer needs a ready source of qualified employees.

The Employer introduced testimony indicating that, over the course of its relationship with the Stardust Hotel, it has needed as few as 1 and as many as 22 employees at the hotel and that Respondent has always been able to supply a sufficient number of qualified employees. On the other hand, Local 501 introduced testimony indicating that there are employees it represents who possess the skills of a journeyman plumber. The record shows, however, that of the 220–270 employees registered on Local 501's out-of-work lists, only 14 claim to possess some degree of plumbing skill. The record further shows that, of 14 employees who claim to possess plumbing skills, only 4 or 5 are licensed journeyman plumbers. Finally, the record shows that Local 501 has no source of journeyman plumbers other than those who "walk in" off the street. Under these circumstances, Local 501 has not established that it would meet the Employer's fluctuating need for qualified employees. Thus, the Employer would be unable to ensure meeting its obligations under its contract with the Stardust Hotel if it utilized employees represented by Local 501.

Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Respondent Local 525.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees represented by Respondent are entitled to perform the work in dispute. We reach this conclusion by relying on the Employer's collective-bargaining agreement with Respondent, the Employer's assignment, preference, and past practice, and the relative skills and economy and efficiency of operations. In making this determination, we are awarding the work in question to employees who are represented by Respondent, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

Employees who are represented by Plumbers & Pipefitters Local 525 of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry are entitled to perform the work of installing new water lines to approximately 1,000 guestrooms in the Stardust Hotel located at Las Vegas Boulevard South, Las Vegas, Nevada.

[12] Art. 24 of Local 501's collective-bargaining agreement with the hotel is entitled "Scope of Work" and provides as follows:

> *24.01* In recognition of the fact that work assignment practices vary from one establishment to another, the parties agreed in July, 1969, that the Operating Engineers would retain jurisdiction over such work as they had regularly been assigned to perform in the past by a particular Employer. That understanding is hereby reaffirmed for the term of this Agreement.